Supreme Court, U.S.
FILED
APR 5 2002
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No. 01-270

In the Supreme Court of the United States

YELLOW TRANSPORTATION, INC., PETITIONER

v.

MICHIGAN, ET AL.

ON WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Section 4005 of the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 2146, permits States to charge commercial motor carriers operating in interstate commerce "a fee * * * that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." 49 U.S.C. 11506(c)(2)(B)(iv) (1994); 49 U.S.C. 14504(c)(2)(B)(iv) (Supp. V 1999). The question presented in this case is:

Whether the Michigan Supreme Court erred in holding that, under 49 U.S.C. 11506(c)(2)(B)(iv)(III) (1994) and 49 U.S.C. 14504(c)(2)(B)(iv)(III) (Supp. V 1999), only a State's "generic" fee is relevant to determining the fee that was "collected or charged as of November 15, 1991."

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INTEREST OF THE UNITED STATES

This case presents a question about implementation of the federal statutory cap on registration fees that States charge interstate motor carriers who operate trucks and buses for hire. See 49 U.S.C. 14504(c)(2)(B)(iv)(III) (Supp. V 1999). The United States has a substantial interest in the Court's resolution of that question. In 1991, Congress charged the Interstate Commerce Commission (ICC) with administering the Single State Registration System for commercial motor vehicles. See 49 U.S.C. 11506(c)(1) and (2) (1994). In 1995, Congress abolished the ICC and assigned the ICC's responsibility for administering the Single State Registration System to the Secretary of Transportation. See ICC Termination Act of 1995, Pub. L. No. 104-88, § 101, 109 Stat. 804 (abolishing ICC); 49 U.S.C.

14504 (Supp. V 1999) (recodified provisions governing Single State Registration System). In the decision under review in this case, the Michigan Supreme Court expressly rejected (Pet. App. 6a-9a) a decision of the ICC, upheld by the D.C. Circuit, that implemented the statutory fee requirements of the Single State Registration System.

The United States also has an interest because, as explained at pages 19-21, *infra*, the Court's resolution of this case may have a significant economic effect upon interstate motor carriers.

At this Court's invitation, the United States filed a brief as amicus curiae in this case at the petition stage.

STATEMENT

1. Section 4005 of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, 105 Stat. 2146, directed the ICC to amend its regulations to establish a Single State Registration System for commercial motor carriers subject to the ICC's jurisdiction. See 49 U.S.C. 11506(a) and (c)(1) (1994). Congress intended that the Single State Registration System would end the "bingo card" regime that had been in effect since the 1960s. That earlier system arose in connection with a federal authorization that allowed the States to require interstate motor carriers to submit proof of their ICC interstate operating authority. See 49 U.S.C. 11506(b) (1988). Under ICC regulations, each State could charge an annual registration fee of as much as ten dollars per vehicle in connection with the filing of the carrier's ICC certificate. See 49 C.F.R. 1023.13 (1990). As proof of state registration, the State would issue registration stamps for the carriers' vehicles, which the carriers' drivers would display on vehicle-specific cards purchased from the National Association of Regulatory Utility Commissioners (NARUC). See H.R. Rep. No. 171, 102 Cong., 1st Sess. Pt. I, at 49 (1991). As of 1991, 39 States (including respondent Michigan) collected registration fees under the bingo card program. The resulting state fees were estimated at $50 million to $60 million annually. *Ibid.*

Under Congress's Single State Registration System, by contrast, "a motor carrier is required to register annually with only one State" and "such single State registration shall be deemed to satisfy the registration requirements of all other States." 49 U.S.C. 14504(c)(1)(A) and (C) (Supp. V 1999); see 49 C.F.R. 367.4(b). Motor carriers generally register with the State where they have their principal place of business. If that State does not participate in the single-State program, the motor carrier registers in the State where it operates the largest number of vehicles.[1] 49 C.F.R. 367.3(a). The State in which the carrier registers collects per-vehicle fees from the carrier on behalf of the other participating States into which the carrier plans to send its trucks or buses. See 49 U.S.C. 14504(c)(2)(A)(iii) (Supp. V 1999); 49 C.F.R. 367.4(c)(4), 367.6(a). Carriers thus no longer have to obtain annual, vehicle-specific registrations from every State their vehicles enter.

ISTEA also limited the registration fees that each State could charge. Congress directed the ICC to

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[1] The 39 States that participated in the bingo card system as of January 1, 1991, are eligible to participate in the single-State program. 49 U.S.C. 14504(c)(2)(D) (Supp. V 1999). The eleven ineligible States are listed in H.R. Rep. No. 171, *supra*, Pt. I, at 49. Oregon is eligible to participate but does not do so. Thus, 38 States participate in the single-State program.

develop and adopt standards establishing a fee system that:

> (I) will be based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates, (II) will minimize the costs of complying with the registration system, and (III) *will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991.*

49 U.S.C. 11506(c)(2)(B)(iv) (1994) (emphasis added). When Congress reassigned responsibility for administering the Single State Registration System to the Secretary of Transportation, it gave the Secretary substantially the same authority.[2] Congress also provided in ISTEA that "[t]he charging or collection of any fee * * * that is not in accordance with the fee system established under subparagraph (B)(iv) * * * shall be deemed to be a burden on interstate commerce." 49 U.S.C. 11506(c)(2)(C) (1994).

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[2] The Secretary's standards

> shall establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that—
>
> (I) is based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates;
>
> (II) minimizes the costs of complying with the registration system; and
>
> (III) *results in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991*[.]

49 U.S.C. 14504(c)(2)(B)(iv) (Supp. V 1999) (emphasis added).

2. Under the bingo card system, it was common for States to enter into "reciprocity agreements" under which they reduced or eliminated registration fees for each other's motor carriers. During the ICC's rulemaking proceeding to implement the single-State system, the question arose whether States that participated in the new regime could increase their revenues by terminating reciprocity agreements that had been in effect in 1991. When proposing new rules in January 1993, the ICC initially questioned whether it had authority to require the States to preserve their reciprocity agreements. *Single State Ins. Registration*, No. MC-100 (Sub-No. 6), 1993 WL 17833, at *12 (ICC Jan. 22, 1993). The ICC noted that the agreements had been made voluntarily rather than by federal compulsion and that "it appears that as long as no carrier is charged more than the [State's] standard November 15, 1991, fee for all carriers (subject to the $10 limit), the requirements of the law are satisfied." *Ibid.*; see *Single State Ins. Registration–1993 Rules*, 9 I.C.C.2d 1, 11 (1992). The ICC added that "it might place a heavy administrative burden on a registration State" if the State had to "collect from different carriers different fees * * * depending on the various reciprocal agreements negotiated by the various States in which each carrier operates." 1993 WL 17833, at *12.

Commenters from the trucking industry, including petitioner, argued in response that the plain language of Section 11506(c)(2)(B)(iv)(III) requires that reciprocity agreements be considered when determining the fees "collected or charged as of November 15, 1991." 49 U.S.C. 11506(c)(2)(B)(iv)(III) (1994); see Pet. App. 53a. Industry representatives further suggested that the terms of the States' reciprocity agreements could "easily be ascertained and disseminated," so that using

those agreements to calculate registration fees would not render the single-State system unduly burdensome to administer. Pet. App. 53a (discussing comments of American Trucking Associations). And the industry argued that—because most States eligible to participate in the single-State system charged per-vehicle fees of $1 or less under their reciprocity agreements—allowing States to raise fees to as much as ten dollars per vehicle could lead to a significant increase in overall fees. *Ibid.* One commenter estimated that state registration fees could increase from approximately $50 million annually before ISTEA to $200 million annually under the single-State system. *Ibid.* A major moving company suggested that its registration costs could increase by as much as $55 per truck if States were free to disregard their reciprocity agreements. *Ibid.*

In May 1993, the ICC promulgated rules to implement the single-State program. See Pet. App. 43a-101a (ICC rulemaking decision). The ICC concluded that its preliminary view on reciprocity agreements was inconsistent with the text of Section 11506(c)(2)(B)(iv) and with Congress's intent "that the flow of revenue for the States be maintained while the burden of the registration system for carriers be reduced." *Id.* at 53a-54a. The ICC observed that if States discontinued their reciprocal fee reductions, "per vehicle fees for many carriers could increase greatly, and some States would realize windfalls." *Id.* at 54a. Although reciprocity agreements might make fee calculations more cumbersome, the ICC determined that this administrative burden (which would fall mainly on the States) was "outweighed by the likely cost to carriers that could result" from terminating the reciprocity agreements. *Ibid.* Accordingly, the ICC determined that States participating in the Single State Registration System

"must consider fees charged or collected under reciprocity agreements when determining the fees charged or collected as of November 15, 1991, as required by §11506(c)(2)(B)(iv)." *Ibid.*[3]

NARUC and 18 state regulatory commissions sought review of the ICC's decision in the United States Court of Appeals for the District of Columbia Circuit under 28 U.S.C. 2321(a) and 2342(5) (1994). See *NARUC* v. *ICC*, 41 F.3d 721 (D.C. Cir. 1994). The state regulators argued that, when Congress referred in Section 11506(c)(2)(B)(iv) to "the fee * * * that [a participating] State collected or charged as of November 15, 1991," it was referring to "the standard fee authorized by each participating State's law," rather than any lower amount that the State might actually have been collecting or charging. Br. of State Petitioners and Intervenors at 1-2 & n.1, 40, *NARUC* v. *ICC*, *supra* (No. 93-1362).

The D.C. Circuit rejected the state regulators' argument. *NARUC* v. *ICC*, 41 F.3d at 729. The court of appeals held that "the plain language of the statute precludes [the States'] interpretation" and "clearly freezes prior state charges" at the levels actually imposed as of November 15, 1991. *Ibid.* In addition, the court rejected the States' argument that the ICC's

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[3] The ICC's determination was consistent with the view of the Department of Transportation, which stated, in a related ICC proceeding, that "[i]f the fee charged on the statutory reference date was one set under a reciprocity agreement, it seems clear that such fee (assuming it is less than $10 per vehicle) constitutes the highest fee chargeable consistent with the provisions of ISTEA." Letter from Rosalind A. Knapp, Deputy General Counsel, Dep't of Transp., to Sidney L. Strickland, Jr., Secretary, ICC, *American Trucking Ass'ns—Pet. for Declaratory Order—Single State Ins. Registration*, ICC No. 41,086, at 2 (Oct. 1, 1993).

interpretation was irrational because it would grandfather any registration fees that were charged in violation of state law as of November 15, 1991. *Ibid.* Section 11506(c)(2)(b)(iv), the court of appeals reasoned, "merely states that the state may not charge *more* than was charged or collected in the past." *Ibid.* That Section, the court explained, does not provide that any fee charged by a State as of November 15, 1991, is lawful. *Ibid.* Because carriers would not be obligated to pay fees that were illegal under state law when imposed, the court determined that the ICC's reading of ISTEA's fee cap did not produce the anomalous results suggested by the state regulators. *Ibid.* No party sought review of the D.C. Circuit's decision in this Court.

3. a. Petitioner in this case is a major interstate trucking company headquartered in Kansas. Pet. 1; Pet. App. 40a. Some of petitioner's trucks carry Illinois license plates. See Pet. 3. For calendar years 1990 and 1991, Michigan did not charge petitioner any bingo stamp fee for trucks that were "base-plated" in Illinois and entered Michigan, Pet. App. 39a-40a; Br. in Opp. App. 3b, because it believed that Illinois did not charge Michigan-based motor carriers a fee. Br. in Opp. App. 3b. Michigan and Illinois did not have a formal reciprocity agreement, however. See *ibid.*

In 1991, Michigan adopted a new policy under which it bases its reciprocal fee reductions on the policies of the State where the carrier has its principal place of business, rather than the State in which a particular vehicle is base-plated. Pet. App. 40a-41a; Br. in Opp. App. 4b-5b. Because petitioner's home State of Kansas did not waive fees for Michigan trucks, Michigan levied its maximum statutory fee of ten dollars per truck on all of petitioner's trucks, including trucks base-plated in

Illinois.[4] In September 1991, Michigan mailed petitioner a fee assessment for calendar year 1992 that had been calculated using the new methodology. Pet. App. 25a, 40a-41a; Br. in Opp. App. 4b-5b. In later years, Michigan continued to assess a ten-dollar fee on each of petitioner's trucks. Pet. App. 40a-41a.

Petitioner paid Michigan's registration fees through its registration State of Kansas and brought suit in the Michigan Court of Claims. Petitioner sought a refund of the fees it paid to Michigan for its Illinois-plated trucks for 1994 (when the Single State Registration System became effective, see 49 U.S.C. 11506(c)(3) (1994)) and later years. See Pet. 11. The Michigan trial court ruled in favor of petitioner. Pet. App. 39a-42a. The court relied on a declaratory order of the ICC in which the ICC, after notice and comment, held that ISTEA's cap on fees at the level "collected or charged as of November 15, 1991," 49 U.S.C. 11506(c)(2)(B)(iv) (1994), referred to fees for calendar year 1991, not fees assessed in advance for calendar year 1992. Pet. App. 41a-42a; see *American Trucking Ass'ns—Petition for Declaratory Order—Single State Ins. Registration*, 9 I.C.C.2d 1184, 1192, 1195 (1993). Deeming the ICC's decision "dispositive," Pet. App. 41a, the trial court held that Michigan's assessments on petitioner's Illinois-licensed trucks were unlawful under ISTEA because

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[4] Michigan law provides:

> The annual fee levied on each interstate or foreign motor carrier vehicle operated in this state and licensed in another state or province of Canada shall be $10.00. The [Michigan Public Service Commission] may enter into a reciprocal agreement with a state or province of Canada that does not charge vehicles licensed in this state economic regulatory fees or taxes and may waive the fee required under this subsection.

Mich. Comp. Laws Ann. § 478.7(4) (West 1991).

they exceeded the fees Michigan had charged petitioner for its Illinois-licensed trucks for calendar year 1991, *id.* at 42a.

b. The Michigan Court of Appeals affirmed. Pet. App. 23a-35a. In the intermediate court's view, Section 11506(c)(2)(B)(iv) did not unambiguously answer the question of whether a fee billed before November 15, 1991 for calendar year 1992 may be considered when determining the State's maximum fee under the Single State Registration System. *Id.* at 28a. Applying *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and state court decisions, the Michigan Court of Appeals held in relevant part that the ICC's rule against considering fees charged in advance for calendar year 1992 was reasonable and entitled to deference. Pet. App. 27a-29a. Relying on the D.C. Circuit's decision in *NARUC* v. *ICC, supra*, the court also rejected Michigan's argument that fee reductions that resulted from reciprocity agreements need not be considered when applying ISTEA's fee cap. Pet. App. 29a.

c. The Michigan Supreme Court reversed. Unlike the lower state courts, it did not consider the significance of Michigan's change from a base-plate reciprocity methodology to a place-of-business methodology for calendar year 1992. Instead, the Michigan Supreme Court addressed the more "fundamental" question of whether reciprocity agreements should be considered at all when determining what fees Michigan collected or charged as of November 15, 1991. Pet. App. 6a. The Court concluded that reciprocity agreements are not relevant because 49 U.S.C. 11506(c)(2)(B) (iv) (1994) unambiguously requires one to "look not at the fees paid by plaintiff in any given year, but at the generic fee Michigan charged or collected from carriers as of November 15, 1991." Pet. App. 9a. The court expressly rejected the D.C. Circuit's contrary conclusion in *NARUC* v. *ICC, supra*. Pet. App. 6a-7a. Because it considered ISTEA to be clear on its face, moreover, the court refused to afford *Chevron* deference to the ICC's determination that reciprocity agreements must be considered when setting fees. *Id.* at 8a-9a. Accordingly, the Michigan Supreme Court held that the fee Michigan "charged or collected as of November 15, 1991" was the ten-dollar maximum fee authorized by Michigan law on that date, without regard to whether Michigan actually waived fees under its reciprocity policy. *Id.* at 10a.

SUMMARY OF ARGUMENT

1. Contrary to the holding of the Michigan Supreme Court, the language of ISTEA does not establish that a State's generic registration fee is the only relevant historical fee for purposes of applying 49 U.S.C. 14504(c)(2)(B)(iv)(III) (Supp. V 1999). Plainly, Congress's reference to "the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991" does not foreclose consideration of registration fees that were collected or charged on a reciprocal basis. The legislative history of ISTEA, moreover, shows that Congress intended to *preserve* pre-existing state revenues from truck and bus registrations while reducing the burden that state registration programs placed on motor carriers. There is no indication that Congress intended to allow the States to raise their registration fees at the expense of motor carriers; indeed, Congress gave every indiction that it intended to minimize the costs of state registration.

2. This case could appropriately be resolved on the basis that, as the D.C. Circuit held in *NARUC* v. *ICC*,

41 F.3d 721, 729 (1994), ISTEA mandates consideration of reciprocal fees collected or charged as of November 15, 1991. If the Court concludes that the statute is ambiguous on that point, however, then it should defer under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the ICC's reasonable rejection of the generic-fee approach that the Michigan Supreme Court adopted. As the ICC explained in its 1993 rulemaking decision, the generic-fee approach would allow States to increase their registration fees substantially and might thereby undermine the intended benefits of the Single State Registration System. The ICC reasonably refused to invite that consequence.

3. The case should be remanded to the Michigan Supreme Court so that it may consider additional issues that are outside the scope of the question on which this Court granted certiorari. Those issues include the cognizability of Michigan's fee assessments for calendar year 1992, which were made before November 15, 1991.

ARGUMENT

THE MAXIMUM STATE REGISTRATION FEE UNDER THE SINGLE STATE REGISTRATION SYSTEM MAY BE LESS THAN THE STATE'S GENERIC FEE

In 1991, Congress directed the ICC to adopt standards to implement the Single State Registration System. See 49 U.S.C. 11506(c) (1994). Congress specified that the ICC's implementing standards should reflect the new statutory cap on state registration fees. 49 U.S.C. 11506(c)(2)(B) (1994). And Congress provided that "[t]he charging or collection of any [registration] fee * * * that is not in accordance with the fee system established [by the ICC] shall be deemed to be a burden

on interstate commerce." 49 U.S.C. 11506(c)(2)(C) (1994). The ICC issued its implementing standards in May 1993, and they became effective on January 1, 1994. Pet. App. 43a, 81a; see 49 U.S.C. 11506(c)(3) (1994).

In 1995, Congress abolished the ICC and assigned the Secretary of Transportation the ICC's former responsibility for administering the Single State Registration System. See ICC Termination Act of 1995, Pub. L. No. 104-88, § 101, 109 Stat. 804 (abolishing ICC); 49 U.S.C. 14504 (Supp. V 1999) (recodification of former Section 11506, as amended). Section 204(a) of the ICC Termination Act, 109 Stat. 941, provided that "[a]ll orders, determinations, rules, [and] regulations" of the ICC "that are in effect on the effective date of such transfer * * * shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked." 49 U.S.C. 701 note (Supp. V 1999) (Savings Provision). In October 1996, the Federal Highway Administration (an operating administration under the Secretary of Transportation) formally adopted the ICC regulations that implemented the Single State Registration System and redesignated them as Part 367 of Title 49 of the Code of Federal Regulations. 61 Fed. Reg. 54,706, 54,707 (1996). Those regulations remain in effect.[5]

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[5] Authority to administer these regulations is now held by the Federal Motor Carrier Safety Administration, a recently created operating administration within the Department of Transportation. See 49 U.S.C. § 113 (Supp. V 1999). Congress has authorized the Secretary of Transportation to adopt new regulations that could modify or terminate the Single State Registration System. 49 U.S.C. 13908 (Supp. V 1999). To date, however, the Secretary has not exercised that authority.

Congress thus made an express delegation of authority to the ICC and, later, the Secretary of Transportation to elucidate ISTEA's fee cap; the responsible agencies have interpreted the fee cap through the ICC's notice-and-comment rulemaking; and the ICC's interpretation was subject to judicial review and upheld, see *NARUC* v. *ICC*, 41 F.3d 721 (D.C. Cir. 1994). In these circumstances, the ICC's implementation of the fee cap—which the Michigan Supreme Court rejected in this case—is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See *United States* v. *Mead Corp.*, 121 S. Ct. 2164, 2171-2173 (2001). Specifically, the ICC's rejection of a generic-fee rule must be deemed controlling unless (1) ISTEA "unambiguously forbids the [ICC's] interpretation" or (2) the ICC's interpretation of ISTEA is not within the range of permissible readings. *Barnhart* v. *Walton*, No. 00-1937, 2002 WL 459209, at *4 (Mar. 27, 2002); see *Chevron*, 467 U.S. at 842-845. Since neither condition is satisfied in this case, the ICC's (and now the Secretary of Transportation's) interpretation should be enforced.

A. ISTEA DOES NOT COMPEL THE MICHIGAN SUPREME COURT'S GENERIC-FEE RULE

1. The Michigan Supreme Court correctly recognized (Pet. App. 8a) that it could not override the plain terms of ISTEA. See, *e.g.*, *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997) ("Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent.") (internal quotation marks omitted). Yet, the state court manifestly erred in holding (Pet. App. 9a) that "the plain meaning of" 49 U.S.C. 11506(c)(2)(B)(iv)(III) (1994) and 49 U.S.C. 14504(c)(2)(B)(iv)(III) (Supp. V 1999) "clear[ly]" establishes that only a State's "generic" registration fee as of November 15, 1991, is relevant when applying ISTEA's fee cap.

ISTEA requires that the Single State Registration System must "result[] in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." 49 U.S.C. 14504(c)(2)(B)(iv)(III) (Supp. V 1999); see 49 U.S.C. 11506(c)(2)(B)(iv)(III) (1994). In *NARUC* v. *ICC*, *supra*, the United States Court of Appeals for the District of Columbia Circuit correctly concluded that this language, on its face, "precludes" an approach that would look to only the maximum fee (of ten dollars or less) authorized by the relevant State's law as of November 15, 1991. 41 F.3d at 729. Whether or not this Court agrees with the D.C. Circuit's reading, however, the language of ISTEA forecloses the Michigan Supreme Court's exactly contrary holding that the generic fee is the only relevant historical charge. Registration fees indisputably can be "collected or charged" even if they were set on a reciprocal basis, rather than by operation of a State's generic-fee statute.

It might be argued that "the fee * * * collected or charged as of November 15, 1991," should be read as if Congress had said "the *highest* fee * * * collected or charged as of November 15, 1991," or, alternatively, "the fee * * * collected or charged to *any carrier* as of November 15, 1991." But Congress did not include such words. In their absence, the fact that a State lawfully could have charged a carrier more than the reciprocal fee that it actually charged as of November 15, 1991, does not support the Michigan Supreme Court's holding.

Nor can former Section 11506 and current Section 14504 be read as outlawing reciprocity arrangements and requiring every State to charge all carriers the same registration fee. Congress did not dictate a uniform fee; it instead provided that a State's fee could not "exceed $10 per vehicle." 49 U.S.C. 11506(c)(2)(B)(iv)(III) (1994); 49 U.S.C. 14504(c)(2)(B)(iv)(III) (Supp. V 1999). There also is no statutory reporting requirement or other provision that would have the practical effect of requiring each State to have a single, uniform registration fee. Furthermore, the aggregated registration payment that each carrier makes to its registration State is necessarily carrier-specific, because it must "be based on the number of commercial motor vehicles the carrier operates in a [participating] State and on the number of States in which the carrier operates." 49 U.S.C. 11506(c)(2)(B)(iv)(I) (1994); see 49 U.S.C. 14504(c)(2)(B)(iv)(I) (Supp. V 1999).

2. The legislative history of ISTEA's fee-cap provision confirms that Congress did not establish each State's generic registration fee as the benchmark. Congress enacted the Single State Registration System because legislators perceived that the bingo card system was a "costly mechanism which d[id] not serve a purpose that justifies its cost." H.R. Rep. No. 171, 102d Cong., 1st Sess. Pt. I, at 49 (1991). The motor carrier industry estimated that its costs of complying with the bingo card system were $250 million per year, whereas the program generated only $50 to $60 million in annual registration fees for the States. *Ibid.* Congress therefore abolished the bingo card program and established the Single State Registration System "to benefit the interstate carriers by eliminating unnecessary compliance burdens" and, in addition, to benefit consumers.

H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 437 (1991).

The House version of what became ISTEA would have ended completely state registration of carriers' federal operating authority and provided $50 million in federal grants to compensate the States for their resulting loss of registration fees. H.R. Rep. No. 171, *supra*, Pt. I, at 49-50, 115. The Senate bill would not have changed the bingo card program or affected States' registration fees. See H.R. Conf. Rep. No. 404, *supra*, at 437. The ensuing conference agreement reflected the House's objective of lowering industry compliance costs by terminating the bingo card program, but also addressed—through the "new annual fee system" codified at 49 U.S.C. 11506 (1994)—the conferees' concern for "preserv[ing] revenues for the states which had participated in the bingo program." H.R. Conf. Rep. No. 404, *supra*, at 437.

The ICC correctly determined in its 1993 rulemaking that Congress's intent when abolishing the bingo card system and capping state registration fees was "that the flow of revenue for the States be maintained while the burden of the registration system for carriers be reduced." Pet. App. 53a-54a. Nothing in the legislative history suggests that Congress's effort to "*preserve*" state revenues (H.R. Conf. Rep. No. 404, *supra*, at 437 (emphasis added)) should be interpreted to allow the States to *increase* their registration fees. Yet that would be the likely result of allowing States to terminate the reciprocity arrangements that were in place as of 1991 and charge any higher fee (of up to ten dollars) that was authorized by state law—and thereby

threaten to increase, rather than reduce, the burden of the registration system on carriers.[6]

B. IF THE STATUTE IS AMBIGUOUS, THEN THE ICC'S REASONABLE INTERPRETATION SHOULD BE DEEMED CONTROLLING

If Section 14504(c)(2)(B)(iv)(III) is ambiguous and does not clearly compel the ICC's rejection of the generic-fee approach, then this Court should enforce the ICC's decision if it embodies "a reasonable policy choice." *Chevron*, 467 U.S. at 845; see, *e.g.*, *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 21 (2000); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-426 (1999); *National R.R. Passenger Corp.* v. *Boston and Me. Corp.*, 503 U.S. 407, 417-424 (1992). See also *Aluminum Co. of Am.* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984) (principles of deference "have particular force" where subject of regulation is technical, agency has expertise, and agency interpretation closely followed statute in time).[7]

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[6] There is a textual argument that 49 U.S.C. 14504(c)(2)(B)(iv) and (C) (Supp. V 1999) *freeze* state registration fees, rather than capping them. The legislative history discussed above, however, suggests that Congress would not have intended to prohibit the States from voluntarily reducing their registration fees below 1991 levels. In any event, the issue of whether a State may charge *less* than the maximum fee determined under Section 14504(c)(2)(B)(iv) has not been raised in this case and it is unlikely ever to generate a justiciable controversy between a State and a motor carrier.

[7] Principles of repose also support deference in this case, because the same question on which this Court granted certiorari was decided against state regulatory commissions in *NARUC* v. *ICC*, *supra*, on direct judicial review of the ICC's rulemaking decision. The petition in this case suggests (at 27 n.13) that "as a party in the [ICC's rulemaking] proceeding, [respondent] Michigan Public Service Commission arguably is bound by its results." See

Successful implementation of the Single State Registration program since 1994 has borne out the ICC's predictive judgment (Pet. App. 54a) that a workable fee system does not depend upon adoption of the generic-fee approach. As the ICC also explained in its 1993 rulemaking decision (*ibid.*), "per vehicle fees for many carriers could increase greatly, and some States would realize windfalls," if States that participate in the Single State Registration System could charge all carriers the maximum fee (of up to ten dollars) that the State lawfully charged (or could have charged) any carrier in 1991. As noted above, see p. 6, *supra*, comments submitted to the ICC during its rulemaking proceeding suggested that, in the early 1990s, state fees could have quadrupled—from approximately $50 million to approximately $200 million nationwide—under the generic-fee approach. *Id.* at 53a. The potential dollar increase would be much greater today, since the number of commercial motor vehicles registered in the United States has approximately doubled since 1991 and state registration revenues have grown accordingly.[8]

Yakus v. *United States*, 321 U.S. 414, 427-448 (1944); but see *JEM Broad. Co.* v. *FCC*, 22 F.3d 320, 325 (D.C. Cir. 1994) (holding that substantive validity of agency rule may be raised as defense in enforcement action). Because that preclusion issue was not presented to or passed on by the Michigan Supreme Court, it need not be addressed by this Court. But principles of repose—embodied in the 60-day deadline for filing a direct challenge to the ICC's 1993 rulemaking (28 U.S.C. 2344 (1994)) and in the requirement that direct review be conducted on the agency's record (28 U.S.C. 2347(a) (1994))—nevertheless should add to the disinclination to overturn the ICC's regulatory policy almost a decade after its adoption.

[8] See *Testimony and Supplemental Material for Hearing on S. 1501, the Motor Carrier Safety Improvement Act of 1999*

In connection with the preparation of this Brief, the Department of Transportation informally surveyed the States about the effect that the Michigan Supreme Court's generic-fee rule might have if applied to their registration programs. The Department determined that at least 23 of the 38 States that participate in the Single State Registration System have reciprocity arrangements with other States.[9] Five States that reduce their fees on a reciprocal basis provided the Department specific information about their fee revenues.[10] Those five States reported collective registration revenues of $8.5 million in 2001 and indicated that their registration fees would climb to a collective total of $20 million if each State's generic fee were charged and the number of registered vehicles did not decrease. The magnitude of the fee increase for each State varied greatly. In two of the States, fees would increase by approximately 50% if the generic fee were charged. In another two States, fees would more than double. In one State, fees would increase by more than 300%. Although the Department's sample encompasses

(Sept. 29, 1999) (visited Apr. 4, 2002) <http://www.senate.gov/commerce/hearings/0929sha.pdf> (Senate committee testimony of Kevin Sharpe, National Conference of State Transportation Specialists, stating that state registration fee collections totaled approximately $95 million as of 1999).

[9] The Department identified seven participating States that do not have reciprocal arrangements, and it was unable to determine whether the remaining eight participating States have reciprocal arrangements.

[10] The five States are Indiana, Minnesota, Oklahoma, South Dakota, and Texas. Alabama reported that, although it charges registration fees on a reciprocal basis, reciprocity does not affect its fees because Alabama's generic fee of $0.45 per vehicle per year is lower than the fees charged by the States with which Alabama has reciprocity arrangements.

just a handful of the States that have reciprocity arrangements, it confirms the ICC's judgment (Pet. App. 54a) that there could be a substantial fee increase if reciprocity arrangements were abandoned, and that some States could collect windfall revenues at the expense of the motor carrier industry.

The sample also highlights the arbitrary results that a generic-fee rule could produce. Even if two States charged exactly the same fees as of November 15, 1991, they would be treated differently under the generic-fee approach if their state statutes set different generic fees. There is no sound policy reason why State A should be able to enforce, under the single-State program, a generic fee that it did not levy under the bingo card regime, while State B, which charged exactly the same fees under the bingo card program, would be precluded from raising its fees if its legislature had not seen fit to set a high generic fee under the bingo card system.

Michigan has argued (Supp. Br. in Opp. 1) that it has no intention of terminating its current reciprocal arrangements and increasing its registration fee to ten dollars per vehicle for all carriers. Michigan also states (*id.* at 1-3) that such a fee increase would violate Section XIII.A. of the National Conference of State Transportation Specialists' *Procedures Manual for the Single State Standards for Registration of Interstate Motor Carrier Operations Under Section 4005, Title IV* (rev. July 1, 1994) (*Procedures Manual*), which sets out rules that the States participating in the Single State Registration System have adopted and agreed among themselves to follow. But neither of those arguments suggests that, under the Michigan Supreme Court's approach, federal law would prevent a State from terminating its reciprocal fee reductions and adopting a

generic fee of as much as ten dollars. As the ICC determined (Pet. App. 53a), construing federal law as permitting such fee increases would be "inconsistent with the spirit of ISTEA." The ICC's rejection of the generic-fee rule adopted by the Michigan Supreme Court in this case was reasonable.

C. THE CASE SHOULD BE REMANDED FOR CONSIDERATION OF ISSUES THAT ARE NOT BEFORE THIS COURT

When granting the petition in this case, the Court—consistent with the suggestion of the United States in its brief as amicus curiae at the petition stage (at 14-16)—reformulated the question presented to reflect the Michigan Supreme Court's precise holding that only Michigan's ten-dollar generic fee is relevant to applying ISTEA's fee cap. See 122 S. Ct. 918 (2002). The judgment of the Michigan Supreme Court therefore should be reversed and the case should be remanded for consideration of additional issues on which that court did not rule. Cf. *Mead*, 121 S. Ct. at 2177; *United States* v. *Haggar Apparel Co.*, 526 U.S. 380, 394-395 (1999).

In particular, the Michigan Supreme Court has not addressed the question of whether ISTEA allows Michigan to set its registration fees at the level that it charged under its new reciprocity policy in September 1991, for calendar year 1992. See Pet. App. 28a (Michigan Court of Appeals holding that registration "fees should be fixed at the level in effect for the 1991 registration year, regardless of whether a new basis for determining reciprocity had been announced for 1992 or whether certain carriers had paid fees for 1992 before November 15, 1991"). That question implicates not only the ICC's decisions (see Pet. App. 26a-29a), but also

issues about Michigan's ability to modify the base-plate reciprocity policy it followed until 1991 and to adopt a place-of-business reciprocity rule that better fits the Single State Registration System.[11] Those issues should be addressed by the Michigan Supreme Court on remand.[12]

This case also may be complicated by the informality of Michigan's reciprocity policies. The record suggests that Michigan unilaterally canceled its reciprocity agreements with other States in 1989. Br. in Opp. App. 3b. Information gathered by the Department of Transportation indicates that, thereafter, Michigan's fee waivers were not based on formal agreements or even a reciprocal waiver by the other State in all instances. The legal significance of those facts—if any—has not

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[11] See Br. in Opp. 9, 11; Br. in Opp. App. 4b, 5b. See also *Procedures Manual* § XIII.B. (encouraging use of carrier's principal place of business as basis for reciprocity, by providing that "[a] motor carrier whose principal place of business is located in a state not eligible to participate in this program *shall not* use its designation of a registration state for this program to afford itself any benefits of reciprocity agreements of that registration state").

[12] In October 1998, the State of Michigan and the Michigan Public Service Commission petitioned the Administrator of the Federal Highway Administration to revisit the ICC's holding in *American Trucking Associations—Petition for Declaratory Order—Single State Insurance Registration*, 9 I.C.C.2d 1184 (1993), that Section 11506's fee cap forbids consideration of fees assessed in advance for calendar year 1992. See *id.* at 1192, 1195. In 2000, motor-carrier safety matters—including Michigan's petition—were transferred from the Federal Highway Administration to the Federal Motor Carrier Safety Administration. The Michigan Supreme Court's holding in this case mooted the relief Michigan sought in its petition. Reversal of the Michigan Supreme Court's decision, however, would provide the agency an opportunity to address Michigan's petition.

been considered by the Michigan courts and might be a proper subject for consideration on remand.

CONCLUSION

The judgment of the Michigan Supreme Court should be reversed, and the case should be remanded to provide that court an opportunity to consider additional issues on which it did not rule.

Respectfully submitted.

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APRIL 2002